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In The

Supreme Court of the United States

October Term, 1996

FLORIDA LEAGUE OF
PROFESSIONAL LOBBYISTS, INC.,

Petitioner,

vs.

WILLIAM N. MEGGS, as State Attorney for the
Second Judicial Circuit of Florida,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER CHAPTER 93-121, LAWS OF FLORIDA, VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING THAT, AS A CONDITION OF MAKING A STATEMENT INTENDED TO INFLUENCE GOVERNMENTAL ACTION, LOBBYISTS AND THEIR PRINCIPALS MUST REPORT ALL EXPENDITURES RELATED TO SUCH STATEMENTS.

II

WHETHER CHAPTER 93-121, LAWS OF FLORIDA, IS A VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EXTENT THAT IT PROHIBITS A PERSON FROM PAYING A CONTINGENCY FEE TO A LOBBYIST.

LIST OF PARTIES

There are no parties other than those listed in the caption and there are no parents or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CITED AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE	2
ARGUMENT	5
I. CHAPTER 93-121, LAWS OF FLORIDA, VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING THAT, AS A CONDITION OF MAKING A STATEMENT INTENDED TO INFLUENCE GOVERNMENTAL ACTION, LOBBYISTS AND THEIR PRINCIPALS MUST REPORT ALL EXPENDITURES RELATED TO SUCH STATEMENTS	5
II. CHAPTER 93-121, LAWS OF FLORIDA, IS A VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EXTENT THAT IT PROHIBITS A PERSON FROM PAYING A CONTINGENCY FEE TO A LOBBYIST	12

TABLE OF CITED AUTHORITIES

Page

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).....5, 12

Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412 (1960).....7

Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).....9

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).....5, 7, 12

Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).....9

Federal Election Comm. v. National Conservative Political Action Committee, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).....5, 12

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).....13

Gibson v. Florida Legislative Investigation Com., 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963).....7

Hazelton v. Sheckels, 202 U.S. 71, 26 S.Ct. 567, 50 L.Ed. 939 (1906).....17

In the matter of The Florida Bar, 349 So.2d 630 (Fla. 1977).....15

McIntyre v. Ohio Elections Commission, ___ U.S. ___, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).....7

Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).....5, 12, 13

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).....7

R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1991).....9

TABLE OF CITED AUTHORITIES – Continued

Page

Riley v. Nat. Fed. of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct 2667, 101 L.Ed.2d 669 (1988) 5, 12, 13, 14, 16

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) 14, 16, 17

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) 14, 17

Talley v. State of California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) 7, 9

The Florida Bar re Amendment, 494 So.2d 960 (Fla. 1986) 15

Turner Broadcasting System v. Federal Communications Comm'n, ___ U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) 9

United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954) 6, 10, 11, 12

United States v. National Treasury Employees Union, ___ U.S. ___, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) 13, 16

FEDERAL STATUTES

28 U.S.C. § 1331 4

FLORIDA STATUTES AND LAWS

Section 11.045 ..... App. 28

Section 11.047 ..... App. 34

Section 112.3215 ..... App. 35

TABLE OF CITED AUTHORITIES – Continued

Page

Section 112.3217 .....App. 42

Chapter 93-121, Laws of Florida ..... *passim*

ORDERS AND OPINIONS BELOW

Order of the District Court for the Northern District of Florida Granting Summary Judgment for the Defendant, Case No. 93-40277-MMP (March 31, 1995)

Opinion of the United States Court of Appeals, Eleventh Circuit, 87 F.3d 457 (11th Cir. 1996)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for which review is sought was rendered on July 9, 1996. The Court has jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C., § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 11.045, FLORIDA STATUTES AS AMENDED BY CHAPTER 93-121, LAWS OF FLORIDA

[See Appendix, p. 28]

SECTION 11.047, FLORIDA STATUTES AS AMENDED BY CHAPTER 93-121, LAWS OF FLORIDA

[See Appendix, p. 34]

SECTION 112.3215, FLORIDA STATUTES AS AMENDED BY CHAPTER 93-121, LAWS OF FLORIDA

[See Appendix, p. 35]

SECTION 112.3217, FLORIDA STATUTES AS AMENDED BY CHAPTER 93-121, LAWS OF FLORIDA

[See Appendix, p. 42]

STATEMENT OF THE CASE

The 1993 Florida Legislature enacted Chapter 93-121, Laws of Florida ("the Act"). The Act requires lobbyists and their principals[1] to file a quarterly report listing all expenditures, divided by category, made by the lobbyist and the principal for the purpose of lobbying, with the

[1] The Act defines a "principal" as "the person, firm, corporation or other entity which has employed or retained a lobbyist." [App. 28, 36]

exception of certain designated items. "Lobbyist" is defined as:

> * * * a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that person or governmental entity.

[App. 28, 35]

The Act defines "lobbying" (with respect to the Legislature) and "lobbies" (with respect to the executive branch) as follows:

> "Lobbying" means influencing or attempting to influence legislative action or non-action through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature.

[App. 28]

> "Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee.

[App. 35]

The Act prohibits the payment or receipt of contingency fees as compensation for lobbying. A "contingency fee" is defined by the Act as:

> * * * a bonus, commission, or nonmonetary benefit as compensation which is dependent or in any way contingent on the enactment, defeat,

> modification, or other outcome of any specific [legislative or executive branch] action.

[App. 34, 42]

Penalties for failure to comply with the reporting requirements by a lobbyist or principal include a fine of up to $5,000 and, in the case of a lobbyist, legislative reprimand, censure, probation or prohibition on lobbying for up to two years. A person in violation of the contingency fee prohibition may be adjudicated guilty of a first degree misdemeanor and must forfeit any fee, bonus, commission or profit received. [App. 32, 34, 41, 42]

The Petitioner filed its Complaint in the District Court for the Northern District of Florida on July 23, 1993 challenging various provisions of Chapter 93-121, Laws of Florida on Federal constitutional grounds. The District Court had jurisdiction pursuant to 28 U.S.C., §1331. The defendant filed his answer on August 9, 1993, denying that the challenged provisions were unconstitutional. No evidentiary hearing was held and the parties filed motions for summary judgment and supporting memoranda. The Court granted the defendant's motion for summary judgment and final judgment for the defendant was entered on March 31, 1995.

The plaintiff filed an appeal and the judgment of the District Court was affirmed by the United States Court of Appeals for the Eleventh Circuit on July 19, 1996.

ARGUMENT

I

CHAPTER 93-121, LAWS OF FLORIDA, VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING THAT, AS A CONDITION OF MAKING A STATEMENT INTENDED TO INFLUENCE GOVERNMENTAL ACTION, LOBBYISTS AND THEIR PRINCIPALS MUST REPORT ALL EXPENDITURES RELATED TO SUCH STATEMENTS.

In a misguided effort at politically popular "lobby reform," the Florida Legislature has enacted a law which infringes upon the most sacred element of an American's free speech. It has done so in a manner that this Court has expressly refused to condone.

The Act regulates communications designed "to influence legislative action or non-action" or "to influence an agency with respect to a decision of the agency in the area of policy * * * ." Communications such as these, designed to influence opinion or action in the political arena, have repeatedly been referred to as being at the "core" of our First Amendment freedoms. E.g. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990); *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Federal Election Comm. v. National Conservative Political Action Committee*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). When a statute burdens such core political speech, it must be subjected to "exacting scrutiny." *Riley v. Nat. Fed. of the Blind*, 487 U.S. 781, 108 S.Ct 2667, 101 L.Ed.2d 669 (1988); *Meyer v. Grant, supra; Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

The petitioner does not challenge the Act's provisions to the extent that they require reporting of expenditures relating to direct contact with governmental officials. This Court has already upheld such limited regulation. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954). The Florida act, however, extends well beyond such regulation into a realm that this Court in *Harriss* specifically declined to approve.

The act defines "lobbyist" as anyone "who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying * * * ." Lobbying is broadly defined to include "influencing or attempting to influence legislative action or nonaction through oral or written communication * * * ." The reporting requirements are not limited to the lobbyist, but include the activities of the principal as well, whether or not the lobbyist is involved in the particular activity. Nothing in the Act requires that the lobbyist or principal communicate or have direct contact with a legislator or executive officer or staff person in order for the disclosure requirements of the Act to take effect. It is clear that the Legislature did not intend to limit the Act to direct contact with government personnel because it requires reporting of expenditures "including, but not limited to, the categories of food and beverages, entertainment, *research*, communication, *media advertising*, publication, travel and lodging." [emphasis supplied]

This Court has devoted considerable attention to compelled disclosure. Commencing in 1958, the Court decided a series of cases in which it held that compelled disclosure of the membership lists of private associations burdened First Amendment associational rights and

required "strict" or "exacting" judicial review. *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412 (1960); *Gibson v. Florida Legislative Investigation Com.*, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963). In its subsequent review of the financial disclosure requirements of the Federal Election Campaign Act, the Court held that, "we must apply the same strict standard of scrutiny" as had been applied in the associational cases. *Buckley v. Valeo, supra* at U.S. 75.

This Court squarely addressed the issue of the right to anonymity in political speech in *Talley v. State of California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960). The Court reviewed a local ordinance which prohibited the distribution of handbills which did not have printed on them the names and addresses of the persons who printed and distributed them. The Court stated that, "there can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at U.S. 64. The Court reviewed the important role that anonymity has played historically in the exercise of freedom of expression and declared the ordinance unconstitutional on its face.

Last year the Court again took the opportunity to pass upon an ordinance requiring identification on handbills. In *McIntyre v. Ohio Elections Commission*, ___ U.S. ___, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), the Court struck down a statute which prohibited the distribution of campaign literature which did not contain the name and address of the person or campaign official issuing the

literature. The Court's description of the ordinance applies verbatim to the statute in the case at bar:

> It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. * * * Furthermore, the category of covered documents is defined by their content – only those publications containing speech designed to influence the voters in an election need bear the required markings. Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny."
>
> * * *
>
> Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment * * * "

Id. at S.Ct. 1518. As in the case at bar, one of the primary justifications advanced as an overriding State interest was informing the electorate of relevant information with which to judge the argument in the pamphlets. The Court rejected this as insufficient:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. * * * The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer

> make statements or disclosures she would otherwise omit.

Id. at 2847.

Under the Florida statute, the hiring of a lobbyist automatically triggers the continuing requirement that the principal as well as the lobbyist report all expenditures made in any effort to influence legislation. The Act itself defines such reporting to include expenditures on "media advertising" and "publications." There is no meaningful distinction between the compelled disclosures required by the Act and those required as a condition of distributing the pamphlets in *Talley* and in *McIntyre*.

The lower court concluded that, because the petitioner was mounting a facial challenge, it was required to meet a higher burden, and prove that the law would operate unconstitutionally in most or all applications. [App. 4, 5] Thus, the lower court effectively discarded the strict scrutiny test. This Court has consistently held that content based speech regulation is presumptively invalid, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1991), and that facial challenges to such regulations must be analyzed with the most exacting scrutiny. *Turner Broadcasting System v. Federal Communications Comm'n*, ___ U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992); *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Florida Act is undeniably content based. See *Turner Broadcasting System v. Federal Communications Comm'n, supra*. The lower court should have applied the strict scrutiny test and required the State

to meet its burden of showing that the act was justified by a substantial state interest and was narrowly drawn. Had the lower court done so, its conclusion would necessarily have been different.

The lower court relied upon its interpretation of this Court's decision in *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954), in which the Court upheld the Federal Regulation of Lobbying Act. Like the Florida Act, the Federal law required registration and reporting by lobbyists. Unlike the Florida Act, the Federal law did not attempt to require disclosure by principals, did not attempt to regulate expenses for media advertising and the like, and included a specific exemption of newspapers and other periodicals. Nevertheless, in order to uphold constitutionality of the Federal law in the face of challenges based both on vagueness and First Amendment infringement, the Court found it necessary to give the law a narrowing construction. The Court interpreted it to apply only to "direct communication with members of Congress." *Id.* at U.S. 623.[2]

The reporting requirements of the Florida Act extend not only to the lobbyist, but to the principal who hires, or contracts with, the lobbyist. Once a lobbyist is employed or contracted with, the principal is required to record and report all of its expenditures made in an attempt to "influence legislative action or nonaction through oral or written communication." There is no requirement that the lobbyist be involved in, or present at, the communication

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[2] Three members of the Court in *Harriss* dissented, strongly criticizing the majority for substantially rewriting the Federal law in order to save it.

or event at which the expenditure is incurred. An organization which employs a lobbyist cannot research, print or distribute a flyer or newspaper advertisement, or send letters to its membership discussing legislative action on a matter without reporting all covered expenses.[3] The Act not only has an impact upon First Amendment rights of expression, but upon associational rights as well. If an organization which has hired a lobbyist has a meeting of its officers or membership at which efforts to influence legislation are discussed, all organizational expenses relating to the meeting must be recorded and reported.

The lower court acknowledged that, "the language of the Florida statute seems to sweep somewhat more broadly [than the Federal act], bringing more 'indirect' lobbying, such as research and media campaigns, within its scope." [App. 6] However, the Court concluded that *Harriss* did not apply strict scrutiny, and that, under its more lenient analysis, the Florida act should be upheld because the lower Court was "unpersuaded that a substantial number of the applications of Chapter 93-121 will offend the First Amendment." [App. 8] Thus, the lower Court has fashioned a new, far more forgiving test for First Amendment analysis of content based laws. In the Eleventh Circuit, it is no longer necessary for the government to show that the challenged law serves a substantial governmental interest and is narrowly drawn, and the chilling effect of the language is of no consequence.

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[3] For purposes of this petition, these types of expenses which are made for purposes other than direct communication with, or entertainment of, a legislator or other government official, are referred to as "indirect expenses."

Rather, the challenger carries the burden of showing that the law will offend the First Amendment in a "substantial" number of applications. The lower court and several others cited by it have cited *Harriss* as a green light to begin weakening the bulwark that this court has erected against First Amendment infringment. The lower court opinion is the boldest step yet in that direction. The Court is respectfully urged not to allow it to stand as precedent for this alarming trend.

II

CHAPTER 93-121, LAWS OF FLORIDA, IS A VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE EXTENT THAT IT PROHIBITS A PERSON FROM PAYING A CONTINGENCY FEE TO A LOBBYIST.

The Act prohibits any agreement to pay a contingency fee in consideration for lobbying services. The State made no effort to articulate a substantial interest to be served by the prohibition and introduced no evidence that the Act serves such an interest.

It is now established beyond dispute that the expenditure of money is a form of expression and that a statute which restricts expenditures intended to enable or foster political speech must be reviewed under the exacting scrutiny standard. *Austin v. Michigan Chamber of Commerce, supra; Meyer v. Grant, supra; Riley v. Nat. Fed. of the Blind, supra; Federal Election Comm. v. National Conservative Political Action Committee, supra; Buckley v. Valeo, supra;*

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).[4]

Last year this Court reaffirmed this principle in *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). The decision declared unconstitutional a statute that prohibited certain federal employees from accepting an honorarium for making an appearance or speech or writing an article. The Court stated:

> Although s. 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. [citations omitted] Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.
>
> * * *
>
> The large scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.

Id. at S.Ct. 1007.

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[4] The fact that the prohibition of contingency fees may be considered a "commercial" regulation does not lower the standard of review. This Court rejected such an argument with respect to regulation of professional fundraisers' fees in *Riley v. Nat. Fed. of the Blind, supra.*

Two Supreme Court cases have a direct bearing upon the contingency fee issue. In *Meyer v. Grant, supra,* the Court reviewed a Colorado statute which prohibited payment of fees to petition circulators for gathering signatures to place an initiative proposal on the ballot. In a unanimous decision, the Court concluded that the case involved "a limitation on political expression subject to exacting scrutiny," *Id.* The Court noted that:

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

In *Riley v. Nat. Fed. of the Blind, supra,* the Supreme Court reviewed a statute which prohibited professional fund raisers from receiving "unreasonable" fees from charitable organizations, and defined reasonableness according to a percentage of receipts collected. The Court reviewed two prior cases in which it had struck down similar statutes placing restrictions upon the amount of fee which could be paid to professional charitable solicitors, *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) and *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In *Riley,* as in the two previous cases, the Court concluded that the fee restriction burdened the exercise of First Amendment rights and was subject to the exacting scrutiny standard.

As the foregoing analysis illustrates, this Court has consistently held that any imposition upon the exercise of First Amendment rights, direct or indirect, particularly in the political arena, will trigger exacting scrutiny. As with the reporting requirements, the State must clear a high hurdle if it is to demonstrate a nexus between avoiding a corrupting influence on the decision-making process and prohibiting the use of a contingency fee. There is nothing in the Act or in the legislative history leading to the Act which suggests any connection between the use of a contingency fee and a corruption of the process. Furthermore, a review of appellate case law involving bribery and other public corruption fails to illustrate any such connection.

In the judicial setting, the Florida Supreme Court has twice reviewed contingency fees and concluded that there is no competent evidence demonstrating any significant abuse of contingency fee arrangements. *The Florida Bar re Amendment*, 494 So.2d 960 (Fla. 1986); *In the matter of The Florida Bar*, 349 So.2d 630 (Fla. 1977). The Federal judiciary continues to recognize contingency fees as legal and ethical in appropriate cases. As to any perceived abuses of the contingency fee between attorney and client, the courts have had no difficulty dealing with the problems through measures far less drastic than complete prohibition.

The State made no effort to offer evidence that there is any connection between the payment of contingency fees to lobbyists and the integrity of the governmental decision-making process and the lower court required none. Just this past February, this Court made clear that

the State's burden of proving a nexus involves more than mere speculation:

> The fact that §501 singles out expressive activity for special regulation heightens the Government's burden of justification. [citation omitted] As we noted last term when reviewing the Federal Communications Commission's must-carry rules for cable television systems, "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." * * * As Justice Brandeis reminded us, a "reasonable" burden on expression requires a justification far stronger than mere speculation about serious harms. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."

United States v. National Treasury Employees Union, supra at S.Ct. 1017.

In three separate cases, this Court has invalidated laws which restricted the use of percentage fees by professional fund raisers. *Schaumberg v. Citizens for a Better Environment, supra; Secretary of State of Maryland v. Joseph H. Munson Co., supra; Riley v. Nat. Fed. of the Blind, supra.*

In each case, the Court has concluded that the Government failed to establish a sufficient nexus between the use of fees based upon percentage of collections and fraud. The Court noted that, "Even if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous, as *Schaumberg* and *Munson* demonstrate." *Id.* at U.S. 793 n. 7. The same would have to be said for the complete prohibition on the use of contingency fees in the Act.

The lower Court relied upon this Court's decision upholding a prohibition on contingency fees for lobbying in the 1906 case of *Hazelton v. Sheckels*, 202 U.S. 71, 26 S.Ct. 567, 50 L.Ed. 939 (1906). That case long preceded the adoption of the strict scrutiny standard and the opinion could not be written today without discarding three decades of First Amendment law. The lower Court recognized that the extensive development of First Amendment law since the *Hazelton* decision might result in this Court striking a contingency-fee ban. Nevertheless, the Court concluded that it was not at liberty to disregard binding precedent. This Court is not bound by such constraint and should demand the showing by the State that was not required in *Hazelton* or in the court below.

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No. _____

In The

Supreme Court of the United States

October Term, 1996

FLORIDA LEAGUE OF
PROFESSIONAL LOBBYISTS, INC.,

Appellant,

vs.

WILLIAM N. MEGGS, as State Attorney for the
Second Judicial Circuit of Florida,

Appellee.

APPENDIX

INDEX TO APPENDIX

Page No.

Opinion of the Eleventh Circuit Court of Appeals ..... App. 1

Order of District Court Granting Summary Judgment ..... App. 14

Chapter 93-121, Laws of Florida ..... App. 28

FLORIDA LEAGUE OF PROFESSIONAL LOBBYISTS, INC., Plaintiff-Appellant,

v.

William N. MEGGS, as State Attorney for the Second Judicial Circuit of Florida, Defendant-Appellee.

No. 95-2555.

United States Court of Appeals,
Eleventh Circuit.

July 9, 1996.

Organization of professional lobbyists brought suit challenging constitutionality of state lobbying statute that imposed disclosure requirements and prohibited contingency fees. The United States District Court for the Northern District of Florida, No. 93-CV-40277, Maurice Mitchell Paul, Chief Judge, granted summary judgment for state, and organization appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) suit was ripe, and organization had standing to bring it; (2) disclosure provisions were not facially unconstitutional under First Amendment; and (3) First Amendment allows states to prohibit lobbyists from receiving contingency fees.

Affirmed.

Louis F. Hubener, Office of the Attorney General, Tallahassee, FL, for appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and LOGAN*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Florida, like every other state in the union,[1] has enacted legislation regulating the conduct of those who "lobby" the state's legislative or executive officials. This appeal requires us to determine whether Chap. 93-121, Laws of Florida, is unconstitutional so far as it requires extensive disclosure by lobbyists and their principals and bars lobbyists from receiving fees contingent on their success in affecting legislative or executive outcomes. We hold that Florida's disclosure requirements survive the facial challenge that Appellant brings today. And, we uphold the ban on contingency-fee lobbying despite whatever doubts recent cases may have cast on its constitutionality. About the contingency fee, we deem ourselves to be bound by some old pronouncements of the Supreme Court; and we lack the power to overrule these pronouncements, even if more recent cases suggest that the Supreme Court might someday reach a result contrary to the one we reach today.

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* Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

[1] *See* Steven Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 Wm. & Mary Bill Rts. J. 717 (1995) (observing that all fifty states have statutes regulating lobbying).

I.

Appellant is an organization of professional lobbyists. The lobbyist-members contend the disclosure and contingency-fee provisions of the statute violate their constitutional rights and assert that they fear imminent reprisal.

The legislation challenged here, Chapter 93-121 of the Laws of Florida, amended the provisions of Fla.Stats. §§ 11.045 and 112.3215. Those provisions define "Lobbying," "Lobbyist," and "Principal." As amended, the sections provide that a lobbyist hired by a principal shall disclose all lobbying expenditures, whether made by the lobbyist or by the principal, and the source of funds for all such expenditures. *See id.* § 11.045(3)(a). In addition, the statute requires disclosure of expenditures by category, and provides a non-exclusive list of categories: "food and beverages, entertainment, research, communication, media advertising, publications, travel, and lodging." *Id.* Furthermore, the Florida legislature has provided for an administrative procedure, so that persons in doubt about the precise operation of the statute may, in writing, seek clarification of the intended reach of the statutes. *Id.* § 11.045(4). As noted, the statute also precludes would-be lobbyists from exchanging their services for an award contingent on legislative outcome. *See id.* § 11.047.

The League does not argue that the statute has been unconstitutionally applied to penalize its members. And, from the record, nothing indicates that any member of the League has requested an advisory opinion as provided for in the statute. The only contentions are that the statute

is overbroad and, therefore, facially invalid in its disclosure provisions and that the contingency-fee ban is unconstitutional in the light of recent Supreme Court precedent. After the parties proffered extensive documentary evidence, the district court granted summary judgment in favor of the state.

II.

If the League is correct that the greater number of this statute's applications are unconstitutional, then its members face an unattractive set of options if they are barred from bringing a facial challenge: refrain from engaging in protected First Amendment activity or risk civil sanction for alleged unethical conduct. Therefore, this action is ripe; and the League has standing to bring it, even though it makes no allegation that its members have actually been sanctioned. *See generally Abbott Lab. v. Gardner*, 387 U.S. 136, 152-53, 87 S.Ct. 1507, 1517-18, 18 L.Ed.2d 681 (1967) (holding that action was ripe before prosecution occurred where appellants faced choice between complying with possibly void regulation and risking "serious" civil penalties). Thus, we address the constitutional challenge even in the absence of concrete indicators on how it will be applied.

We do not say that the absence of allegations of prosecutions under the Act is irrelevant to our disposition of this case. Because Appellant has failed to allege a specific unconstitutional application, its challenge must be characterized as a facial – as distinct from as-applied – challenge. This characterization requires Appellant to meet a higher burden because, as the Supreme Court has

indicated, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully. . . . " *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (holding Bail Reform Act of 1984 not facially invalid).

Some disagreement has appeared lately among members of the Supreme Court on exactly how high the threshold for facial invalidation should be set. As we understand it, some Justices interpret Supreme Court precedent to indicate that a statute is not facially invalid unless there is no set of circumstances in which it would operate constitutionally; others contend the cases require only that a statute would operate unconstitutionally in most cases. *Compare Janklow v. Planned Parenthood*, ___ U.S. ___ , ___ & n. 1, 116 S.Ct. 1582, 1583 & n. 1, 134 L.Ed.2d 679 (1996) (Mem.) (Stevens, J.) (asserting that statute is facially invalid if unconstitutional in large fraction of cases) *with id.* at ___ , 116 S.Ct. at 1586 (Scalia, J., dissenting from the denial of certiorari) (statute is facially invalid only if it would never operate constitutionally).[2] But, because we conclude (below) that Appellant has failed to show that the Florida lobbying amendments would operate unconstitutionally often enough to satisfy either test, we can safely conclude that this facial challenge fails.

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[2] Also, we note that this case is a First Amendment case, where because of the overbreadth doctrine, facial challenges may succeed more often. *See New York v. Ferber*, 458 U.S. 747, 767-74, 102 S.Ct. 3348, 3360-63, 73 L.Ed.2d 1113 (1982); *see also Salerno*, 481 U.S. at 744-45, 107 S.Ct. at 2100.

III.

Within the framework of the facial challenge, we measure the Act against the appropriate First Amendment standard. In defining that standard, we turn first to *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), where the Supreme Court upheld the Federal Regulation of Lobbying Act against a First Amendment challenge. The Court construed that Act as addressing only face-to-face, "direct" contact between lobbyists and officials. (As discussed above, the language of the Florida statute seems to sweep somewhat more broadly, bringing more "indirect" lobbying, such as research and media campaigns, within its scope.)

In *Harriss*, the Supreme Court was not explicit about the level of constitutional scrutiny applied. It appears, however, that the Court did not subject the lobbying restrictions to the demands of strict scrutiny. Instead, the Court satisfied itself that the government had asserted sufficient interests – specifically, "maintain[ing] the integrity of a basic governmental process," 347 U.S. at 625, 74 S.Ct. at 816, and preserving to Congress "the power of self-protection." *Id.* Having recognized these interests, the Court rejected the facial challenge, stating that the appellants' predictions of constitutional infringement amounted to "hypothetical borderline situations," and identifying as "too remote" the possibility that persons would engage in substantial self-censorship. Id.

In *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n*, 761 F.2d 509, 512 (8th Cir.1985), the court looked to *Harriss* in upholding a statute similar in operation to the one

challenged here. The Eighth Circuit read *Harriss* as demonstrating broad approval for lobbying restrictions. *Minnesota State Ethical Practices*, 761 F.2d at 512. The regulations approved in *Minnesota State Ethical Practices* were considerably broader than those in *Harriss*, extending to internal communication among members of an organization as well as to "direct" contacts with legislators.

Several other courts have similarly interpreted *Harriss* and have rejected broad constitutional attacks on lobbying disclosure requirements. In *Fair Political Practices Comm'n v. Superior Ct. of Los Angeles*, 25 Cal.3d 33, 157 Cal.Rptr. 855, 863-64, 599 P.2d 46, 54 (1979), the court concluded that under *Harriss*, "[a]pplication of the burdens of registration and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his voice." The court, therefore, declined to apply strict scrutiny to, and ultimately sustained, the registration and expenditure-reporting requirements. *Id. See also* Commission on Indep. *Colleges & Univs. v. New York Temporary State Comm'n on Reg'n of Lobbying*, 534 F.Supp. 489, 497 (N.D.N.Y.1982) (upholding New York lobbying statute); *ACLU v. New Jersey Election Law Enforcement Comm'n*, 509 F.Supp. 1123, 1130 (D.N.J.1981) (upholding lobbyist disclosure provisions of New Jersey statute); *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911, 931-32, *appeal dismissed*, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974) (upholding disclosure requirements of Washington state lobbying initiative). *But cf. Fair Political Practices*, 157 Cal.Rptr. at 863-64, 599 P.2d at 54 (striking "transaction reporting requirements" of California statute, which required reporting of "lobbyist

and employer transactions with others, which may be entirely unrelated to lobbyist activities").

IV.

Against the standard of *Harriss* and its progeny, we are unpersuaded that a substantial number of the applications of Chapter 93-121 will offend the First Amendment. So, we reject the facial challenge.

The League contends that the First Amendment demands strict scrutiny of the reporting requirements. Thus, in the League's estimation, the law is overbroad and facially invalid to the extent the state cannot show both a compelling interest in its ends and that the statute is narrowly tailored to avoid undue interference with the exercise of legitimate speech rights. The League concludes that the statute is not narrowly tailored to the extent it requires reporting of "indirect expenses when there is no direct contact with governmental officials." In the light of the case law summarized above, we disagree.

The League concedes, as it must, that the state has articulated legitimate interests. The Supreme Court has made clear that circumstances like these implicate the correlative interests of voters (in appraising the integrity and performance of officeholders and candidates, in view of the pressures they face) and legislators (in "self-protection" in the face of coordinated pressure campaigns). *See, e.g., McIntyre v. Ohio Elections Comm'n*, ___ U.S. ___, ___, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are

elected will inevitably shape the course that we follow as a nation."); *Buckley v. Valeo*, 424 U.S. 1, 67, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976) (discussing governmental interest in "alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office"); *Harriss*, 347 U.S. at 625, 74 S.Ct. at 816 ("Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.").

And, these interests continue to apply when the pressures to be evaluated by voters and government officials are "indirect" rather than "direct." *See Minnesota State Ethical Practices*, 761 F.2d at 512-513 (recognizing state interest in applying reporting requirements to intra-organization "lobbying" activity not involving direct contact with government officials). In fact, the government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements. *Harriss* appears to have acknowledged as much when, even reading the statute narrowly to apply only to "direct communication," it nonetheless defined direct communication to include "artificially stimulated letter campaign[s]." *Harriss*, 347 U.S. at 620, 74 S.Ct. at 813.

Because the interests of the state of Florida are compelling, the facial challenge can succeed only if the League has shown that a substantial fraction of the applications of the challenged law will fail to further these

articulated interests. On the record before us, we conclude that the League cannot satisfy this burden. We reach this conclusion in the light of both *Harriss's* notation that mail campaign expenses may be required to be reported and the reasoning of *Minnesota State Ethical Practices,* which we find persuasive; these sources strongly indicate that the First Amendment permits required reporting of considerably more than face-to-face contact with government officials.

As for the League's hypothesized, fact-specific worst-case scenarios, we also decline to accept the facial challenge based on these perceived problems. The League suggests, for example, that the state may begin applying the expense reporting requirements against editorial writers who urge a legislative result, simply because the journalists are employed by corporate structures that employ lobbyists for totally unrelated reasons. The Supreme Court in *Harriss* discounted similar "hypothetical borderline situations." *Harriss,* 347 U.S. at 626, 74 S.Ct. at 816. For now, we discount them here also.

V.

Therefore, we decline to validate the facial challenge.[3] But, in the future courts can, to the extent necessary, evaluate the statute's constitutionality as-applied.

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[3] One commentator has suggested that two interests in particular are served by sparing use of the power to void a statute on its face, both of which interests are applicable in this case. These interests are, first, in restraining the power of the judiciary to interfere with the prerogatives of the political branches of government and, second, in ensuring that the courts are confronted with concrete facts, thereby reducing the rate of

They can also sever those parts of the statute, if any, that factual development shows can never be applied constitutionally. *See, e.g., Harriss,* 347 U.S. at 627, 74 S.Ct. at 817 (noting, in upholding statute against facial challenge, that act contained severability clause that could be used to remedy later problems). But, we now see no indication that part of this statute must fall [sic] to preserve its constitutionality; and, therefore, we decline to strike any provision. We, however, express no opinion on the constitutionality of particular fact-based challenges that may arise in the future. We just conclude that the district court committed no error of law in denying relief to the Plaintiff on its facial challenge to the lobbying disclosure requirements.

VI.

Appellant also argues that the First Amendment bars the prohibition on the receipt of fees contingent on the passage of favorable legislation. The League relies chiefly on *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), in which the Court subjected to "exacting scrutiny" and struck down a state statute prohibiting payment of fees to petition circulators, and on *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), in which the Court again struck down a state statute under the heightened First Amendment standard, this one a prohibition on the

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error in constitutional decisionmaking. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 Stan.L.Rev. 235, 245-46 (1994).

receipt of "unreasonable" fees by professional fundraisers working for charitable organizations.

Florida points out that in cases decided well before the articulation of "exacting scrutiny," the Supreme Court specifically held that contracts to lobby for a legislative result, with the fee contingent on a favorable legislative outcome, were void *ab initio* as against public policy: *Hazelton v. Sheckels*, 202 U.S. 71, 78, 26 S.Ct. 567, 568, 50 L.Ed. 939 (1906), and *Providence Tool Co. v. Norris*, 69 U.S. (2 Wall.) 45, 55, 17 L.Ed. 868 (1864).[4] The League does not contest the applicability of these older decisions to this case. And, we are persuaded that these decisions permit a legislature to prohibit contingent compensation. The League, however, suggested at argument that the extensive, interim developments of First Amendment law

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[4] For example, in *Norris*, a case involving a contract to lobby for contracts with the Department of War, the Court wrote:

Legislation should be prompted solely from considerations of the public good. . . . Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

69 U.S. (2 Wall.) at 55. The Court also noted that "[t]here is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments." *Id.* In Hazelton, Justice Holmes held invalid an agreement to pay an individual a sum equal to the excess of the dollar amount of a desired government contract over a set amount. 202 U.S. at 78, 26 S.Ct. at 568.

establish conclusively that the Supreme Court today would strike a contingency-fee ban on lobbying.[5]

This prediction may be accurate, but we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court. The Court instructed, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-86, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989), that Courts of Appeals should continue to follow directly applicable precedent that rests on reasoning seemingly rejected in analogous cases, "leaving to this Court the prerogative of overruling its own decisions." *Id.* We take this admonition to heart, and we decline to take any step which might appear to overrule *Norris* and *Hazelton*.

Therefore, the decision of the district court is AFFIRMED.

AFFIRMED.

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[5] Some support for this argument appears in the decision of the Montana Supreme Court in *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 632 P.2d 300, 308 (1981), which struck down a ban on contingency-fee lobbying as overbroad.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

FLORIDA LEAGUE OF PROFESSIONAL LOBBYISTS, INC.,

Plaintiff,

v.

WILLIAM N. MEGGS, as State Attorney for the Second Judicial Circuit of Florida,

Defendant.
_____/

CASE NO. 93-40277-MMP

(Filed March 31, 1995)

ORDER

This cause is before the Court on cross motions for summary judgment. The issue is whether Chapter 93-121, Laws of Florida, which imposes disclosure requirements on lobbyists and their principals and bans contingency fee lobbying is constitutional. For the reasons stated below, summary judgment is GRANTED in favor of the defendant.

BACKGROUND

In 1993, the State of Florida enacted Chapter 93-121, Laws of Florida ("the Act"), which overhauled the existing law regulating lobbying before the Florida legislature and executive branch agencies. Effective October 1, 1993, the

Act requires lobbyists[1] and their principals[2] to file a quarterly report disclosing all lobbying expenditures incurred by the lobbyist and the principal.[3] Failure to

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[1] Under the Act, lobbyists are defined as follows:

> "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that person or governmental entity.

Fla. Stat. ch. 11.045(1)(e) (1993).

[2] Principals are defined as:

> "Principal" means the person, firm, corporation, or other entity which has employed or retained a lobbyist.

Fla. Stat. ch. 11.045(1)(f) (1993).

[3] The Act provides:

> Statements shall be filed quarterly by all registered lobbyists, which statements shall disclose all lobbying expenditures by the lobbyist and the principal and the source of funds for such expenditures. All expenditures made by the lobbyist and the principal for the purpose of lobbying must be reported. The report of such expenditures must identify whether the expenditure was made directly by the lobbyist, directly by the principal, initiated or expended by the lobbyist and paid for by the principal, or initiated or expended by the principal and paid for by the lobbyist. Expenditures made must be reported by the category of the expenditure, including, but not limited to, the categories of food and beverages, entertainment, research, communication, media advertising, publications, travel, and lodging. Lobbying expenditures do not include a lobbyist's or principal's salary, office

comply with the reporting requirements is punishable by a fine of up to $5,000. Fla. Stat. ch. 11.045(6) & (7) (1993). In addition, the lobbyist may be further sanctioned by the Florida Legislature with reprimand, censure, probation, or prohibition from lobbying for up to 24 months. Fla. Stat. ch. 11.045(6) (1993).

The Act also prohibits contingency fee lobbying.[4] A violator of this ban may be prosecuted for a misdemeanor of the first degree. Fla. Stat. ch. 11.047(3) (1993). If the violator is a lobbyist, then he or she is subject to forfeiture of any fee, bonus, commission, or profit received. *Id.*

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expenses, and personal expenses for lodging, meals, and travel.

Fla. Stat. ch. 11.045(3)(a) (1993).

The Act defines lobbying as follows:

> "Lobbying" means influencing or attempting to influence legislative action or non-action through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature.

Fla. Stat. ch. 11.045(1)(d).

[4] The Act provides:

> No person may, in whole or in part, pay, give, or receive, or agree to pay, give, or receive, a contingency fee. However, this subsection does not apply to claims bills.

Fla. Stat. ch. 11.047(2) (1993).

Under the Act, "contingency fee" is defined as:

> . . . a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent or in any way contingent on the enactment, defeat, modification, or other outcome of any specific legislative action.

Fla. Stat. ch. 11.047(1) (1993).

The Florida League of Professional Lobbyists ("the League") is an association of lobbyists. The League instituted this action against William Meggs ("Meggs") in his capacity as the State Attorney for the Second Judicial Circuit, challenging the constitutionality of the statute on First Amendment grounds. The League alleges in Count I that the expense and difficulty of maintaining the records as required by Ch 93-121, as well as the necessity of revealing detailed information regarding the relationship between the lobbyist and the principal, would cause persons and organizations, including some members of the plaintiff organization and their principals, to forego exercising their First Amendment rights in certain instances because of inability or unwillingness to undertake such burden and expense. In Count II, the League alleges that Ch. 93-121's reporting requirement forces the lobbyist to disclose the identity of the principal and that such forced disclosure will cause the aforementioned class of people to forego exercising their First Amendment rights in some issues and reduce the exercise of such rights on others due to an unwillingness to relinquish their privacy and anonymity and a fear of retribution. The League also alleges in Count III that Ch 93-121's prohibition on contingency fee lobbying would deprive the same aforementioned class of people of their First Amendment rights because of an inability or unwillingness to compensate a lobbyist by other forms or consideration.

DISCUSSION

Courts have long recognized that compelled disclosure of one's political association may have the practical effect of discouraging the exercise of one's First

Amendment rights. *NAACP v. Alabama*, 357 U.S. 449, 461, 78 S. Ct. 1163, 1171 (1958). As a result, courts have subjected governmental attempts to compel such disclosure to strict scrutiny. *Id.* at 461, 78 S. Ct. at 1171. To be valid, a statute that requires such disclosure must serve a compelling governmental interest and must be substantially related to such governmental interest. *Id.* at 461, 78 S. Ct. at 1171. In addition, the statute must be narrowly tailored to serve the stated interest. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 252 (1960).

When compelled disclosure of one's political association is designed to protect the integrity of the political process, courts have held that such governmental attempt does not violate the First Amendment. In *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808 (1954), for example, the Supreme Court considered whether the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 ("Lobbying Act"), serves a compelling governmental interest. The lobbyist registration provision of the Lobbying Act requires disclosure of the lobbyist's employer, sources of funds, disbursements, and the legislation sought to be influenced. The Supreme Court reasoned that "the American ideal of government by elected representatives" cannot be fully realized unless elected officials can properly evaluate who is exerting the political pressures to which they are subjected. 347 U.S. at 625, 74 S. Ct. at 816. Otherwise, the Court reasoned, the voice of special interest groups seeking favored treatment may easily drown out the voice of people by "masquerading as proponents of the public weal." *Id.* at 625, 74 S. Ct. at 816. Thus, the Court ruled that requiring the lobbyist to disclosure [sic] whom he works for, where he gets his funds, and what

legislation he works to influence serves a compelling governmental interest of maintaining "the integrity of a basic governmental process." *Id.* at 625, 74 S. Ct. at 816.

In the instant case, plaintiff does not dispute that the State of Florida has a compelling governmental interest in regulating lobbying before the Florida Legislature and administrative agencies. Instead, Plaintiff challenges Chapter 93-121 on the grounds that the disclosure provisions are not substantially related to such governmental interest and are impermissibly broad. Plaintiff argues that the disclosure requirements have no nexus to, and are not narrowly tailored to achieve, the stated purpose of Chap. 93-121[5] because they require disclosure of both "direct" and "indirect" expenditures. Plaintiff concedes that "direct expenditures," such as expenditures incurred in

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[5] The Florida Legislature states the legislative intent and purpose of Chapter 93-121 as follows:

> The Legislature finds that the operation of open and responsible government requires the fullest opportunity to be afforded to the people to petition their government for the redress of grievances and to express freely their opinions on legislative action. Further, the Legislature finds that preservation of the integrity of the governmental decisionmaking process is essential to the continued functioning of an open government. Therefore, in order to preserve and maintain the integrity of the process and to better inform the citizens of the efforts to influence legislative branch action, the Legislature finds it necessary to require the public disclosure of the identity, expenditures, and activities of certain persons who attempt to influence actions of the legislative branch.

connection with directly communicating with or entertaining members of the Florida Legislature, may be subject to disclosure.[6] Plaintiff contends, however, "indirect" expenditures should not be subject to disclosure because compelling disclosure of "indirect" expenditures would mean "an organization which employs a lobbyist cannot distribute a flyer, publish a newspaper advertisement, or send letters to its membership urging legislative action on a matter" without reporting such expenditures. In support of its argument, the plaintiff cites the portion of *United States v. Harriss* where the Supreme Court stated that the disclosure requirements for the Lobbying Act should apply only to "direct communication with members of Congress on pending or proposed federal legislation."

Plaintiff's argument is not persuasive. The Lobbying Act, which was the subject of scrutiny in *Harriss*, contains the following definitions of lobbying:

> (a) The passage or defeat of any legislation by the Congress of the United States; or
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> (b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

In responding to the vagueness challenge to the above provisions, the Court ruled that the provisions "should be

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[6] Plaintiff defines "indirect expenses" as:

> "For purposes of this memorandum, these types of expenses which are made for purposes other than direct communication with, or entertainment of, a legislator or other government official, are referred to as "indirect expenses."

construed to refer only to 'lobbying in its commonly accepted sense' – to direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620, 74 S. Ct. at 813. However, the Court also stated that such "direct communication" means pressures exerted 1) by the lobbyists themselves, 2) through their hirelings, or 3) through an artificially stimulated letter campaign. *Id.* at 620, 74 S. Ct. at 813. In other words, "direct communication" means more than just "direct communication."

The meaning of "direct communication" formulated by the Supreme Court in *Harriss* was further considered in *Minnesota State Ethical Practices v. National Rifle*, 761 F.2d 509 (1985). In that case, the challenged statute was the Minnesota Ethics in Government Act, which required lobbyists to file registration forms and make regular reports of their lobbying activities. Minnesota law defined lobbying as "attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials." *Id.* at 510.[7]

The National Rifle Association Political Victory Fund (NRA-PVF), located in Washington, D.C., challenged the statute after the district court ordered its executor director to register and report as a lobbyist for sending letters and mailgrams to the members of the NRA in Minnesota.

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[7] Compare with Chapter 93-121. Chapter 93-121 defines lobbying as:

> "Lobbying" means influencing or attempting to influence legislative action or non-action *through oral or written communication* . . .

Fla. Stat. ch. 11.045(1)(d) (emphasis added).

The letters and mailgram urged the members to contact their state legislators in support of pending legislations. Characterizing this form of lobbying as "artificially stimulated letter campaign" mentioned in *Harriss*, the Eighth Circuit ruled that the State of Minnesota had a compelling interest in requiring NRA-PVF to register and report their activities.

Much like the letters and mailgram in *Minnesota State Ethical Practices*, the activities that the plaintiff in this case wants excluded from disclosure requirements, "distribut[ing] a flyer, publish[ing] a newspaper advertisement, or send[ing] letters to its membership urging legislative action on a matter," fall within the ambit of "artificially stimulated letter campaign." As such, they are the kind of lobbying that the State of Florida has a compelling interest in requiring disclosure. The plaintiff's challenge to Chapter 93-121 on the grounds that the reporting requirements lack a substantial relation to a compelling state interest and are not narrowly drawn thus must fail.

Plaintiff also argues that the administrative burden of complying with the reporting requirements would cause individuals or associations with limited funds to forego retaining a lobbyist and deter them from fully exercising their First Amendment rights. A similar argument was rejected by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1975). In that case, Supreme Court examined the constitutionality of the reporting and disclosure requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-56 ("Campaign Act"). In 1975, the Campaign Act required quarterly reports listing the name, address, occupation, and place of business of each

person who. contributed $100 or more in a calendar year. The Court acknowledges that the reporting requirements "will deter some individuals who otherwise might contribute," and in some instances "may even expose contributors to harassment or retaliation." 424 U.S. at 69, 96 S. Ct. at 658. The Court stated that "[t]hese are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by [the disclosure] legislation." *Id.* at 69, 96 S. Ct. at 658.

The Court reasoned that in *NAACP v. Alabama*, for example, the compelling governmental interest in disclosure "has not been shown to be sufficient to overcome the petitioner's constitutional objections" because the petitioner there, NAACP, had made an "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 70, 96 S. Ct. at 658 (citation and quotation marks omitted). The Court reasoned, however, that *NAACP v. Alabama* was distinguishable because the best evidence proffered by the appellants in *Buckley* was the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. *Id.* at 73, 96 S. Ct. at 660. The Court found that this evidence, which the appellants characterized as "the clearly articulated fears of individuals, well experienced in the political process," was not the record evidence of the sort proffered in *NAACP v. Alabama* and too speculative to support the appellants' argument. *Id.* at 7273, 96 S. Ct. at 660.

The evidence proffered by the plaintiff in this case suffers from the same defect. The affidavit of David P. Yon, who is the chief financial officer of Associated Industries of Florida, a trade association, contains only the estimates of what it would cost to comply with the reporting requirements of Chapter 93-121.[8] No where does it contain evidence that the burden of complying with the reporting requirements have deterred or will deter individuals from exercising their First Amendment rights. This affidavit is clearly not the sort of record evidence offered in *NAACP v. Alabama* which demonstrated the chilling effect of the compelled disclosure. Having failed to establish that the reporting requirements of Chapter 93-121 impose undue burden, the plaintiff's administrative burden argument must fail as well.

Lastly, the plaintiff contends that Chapter 93-121's ban on the contingency fee arrangement violates the First Amendment rights. The plaintiff argues that the inability to pay a lobbyist a contingency fee will reduce the ability of some persons or organizations to retain lobbyists, which in turn will reduce the exercise of free speech by those persons.

The plaintiff's argument is not persuasive. In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908 (1973), state

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[8] In his affidavit, Mr. Yon estimated that a quarterly report mandated by Chapter 93-121 would require about 32 hours of a trained professional's time at a rate of $60 to $70 an hour. He also testified that an organization would probably need to purchase a customized computer program costing $3,000 to keep track of their lobbying expenditures.

employees brought an overbreadth challenge to the Oklahoma statute that provided that no state employee in the classified service may engage in partisan politics.[9] The State employees did not dispute that the State of Oklahoma had a compelling interest in placing even-handed restrictions on the partisan political conduct of state employees.[10] Instead, they contended that the statute was overbroad because it could be construed as applying to protected political expression such as wearing of political buttons or the displaying of bumper stickers.

The Supreme Court reasoned that facial overbreadth adjudication is an exception to traditional rules and that it "attenuates as the otherwise unprotected behavior that it forbids the State sanction moves from 'pure speech'

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[9] The statute provided that such employee should not directly or indirectly solicit, receive, or in any manner be concerned in soliciting or receiving any assessment or contribution for any political organization, candidacy or other political purpose or be a member of any national, state or local committee of a political party, or an officer or member of a committee or a partisan political club, or a candidate for nomination or election to any paid public office or take part in management or affairs of any political party or in any political campaign. *Id.* at 616, 93 S. Ct. at 2917.

[10] The Court stated that:

> Appellants freely concede that [placing even-handed restrictions on partisan political conduct of state employees] serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion."

Id. at 607, 93 S. Ct. at 2913.

toward conduct." *Id.*, 93 S. Ct. at 2918. The Court further reasoned that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, 93 S. Ct. at 2918. The Court found that the mere possibility that some person's arguably protected conduct – wearing of political buttons or the use of bumper stickers – may be chilled does not make the statute substantially overbroad and does not justify striking down the statute *in toto*. *Id.* at 619, 93 S. Ct. at 2919.

In the present case, the ban on contingency fee lobbying may arguably implicate the First Amendment right of speech. The application of the overbreadth doctrine is not warranted, however, for two reasons. First, the State of Florida has a legitimate governmental interest in regulating contingency fee lobbying. *Tool Company v. Norris*, 69 U.S. 45, 49 (1864) ("The evil tendencies of an agreement to procure a favor from one of the departments of the Government for a compensation contingent upon the success of the undertaking, are as great as in the case of an agreement to procure legislation upon a similar consideration"); *Bradley v. American Radiator & Standard Sanitary Corporation*, 6 F.R.D. 37, 41 (S.D.N.Y. 1946) ("a contingency fee employment contract looking toward the procurement of a specific contract for war materials by a person not regularly engaged by the contractor in securing business . . . is invalid as contrary to public policy"). Second, the plaintiff has not established that the alleged overbreadth of the ban is real and substantial. The plaintiff contends that some persons or organizations who do

not have the financial ability, or who are simply unwilling to, pay lobbyists up front may be discouraged from exercising their First Amendment right of speech through lobbyists. The "chill" alleged here as not of the same nature as "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" that dissuaded some members of NAACP from exercising their right of association in *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958). Furthermore, aside from its assertion, the plaintiff has not proffered any evidence that indicates the ban has discouraged, or the effect of discouraging, a person's exercise of First Amendment rights. Therefore, the alleged overbreadth of the ban on contingency fee lobbying is not, judged in relation to the State of Florida's legitimate governmental interest, real or substantial enough to justify striking down the whole statute.

CONCLUSION

Accordingly, summary judgment is GRANTED in favor of the Defendant. The Clerk is directed [sic] enter judgment in favor of the Defendant and close the case.

DONE AND ORDERED this 31st day of March, 1995.

/s/ Maurice M. Paul
MAURICE M. PAUL,
CHIEF JUDGE

11.045 Lobbyists; registration and reporting; exemptions; penalties. –

(1) As used in this section, unless the context otherwise requires:

(a) "Committee" means the committee of each house charged by the presiding officer with responsibility for ethical conduct of lobbyists.

(b) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying.

(c) "Legislative action" means introduction, sponsorship, testimony, debate, voting, or any other official action on any measure, resolution, amendment, nomination, appointment, or report of, or any matter which may be the subject of action by, either house of the Legislature or any committee thereof.

(d) "Lobbying" means influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature.

(e) "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.

(f) "Principal" means the person, firm, corporation, or other entity which has employed or retained a lobbyist.

(2) Each house of the Legislature shall provide by rule, or may provide by a joint rule adopted by both houses, for the registration of lobbyists who lobby the Legislature. The rule may provide for the payment of a registration fee. The rule may provide for exemptions from registration or registration fees. The rule shall provide that:

(a) Registration is required for each principal represented.

(b) Every registrant shall be required to state the extent of any direct business association or partnership with any current member of the Legislature.

(c) Each lobbyist and each principal shall preserve for a period of 4 years all accounts, bills, receipts, computer records, books, papers, and other documents and records necessary to substantiate lobbying expenditures. Any documents and records retained pursuant to this section may be inspected under reasonable circumstances by any authorized representative of the Legislature. The right of inspection may be enforced by appropriate writ issued by any court of competent jurisdiction.

(d) All registrations shall be open to the public.

(e) Any person who is exempt from registration under the rule shall not be considered a lobbyist for any purpose.

(3) Each house of the Legislature shall provide by rule the following reporting requirements:

(a) Statements shall be filed quarterly by all registered lobbyists, which statements shall disclose all lobbying expenditures by the lobbyist and the principal and

the source of funds for such expenditures. All expenditures made by the lobbyist and the principal for the purpose of lobbying must be reported. The report of such expenditures must identify whether the expenditure was made directly by the lobbyist, directly by the principal, initiated or expended by the lobbyist and paid for by the principal, or initiated or expended by the principal and paid for by the lobbyist. Expenditures made must be reported by the category of the expenditure, including, but not limited to, the categories of food and beverages, entertainment, research, communication, media advertising, publications, travel, and lodging. Lobbying expenditures do not include a lobbyist's or principal's salary, office expenses, and personal expenses for lodging, meals, and travel.

(b) A principal who is represented by two or more lobbyists shall designate one lobbyist whose expenditure report shall include all lobbying expenditures of the principal and of all of the lobbyists on behalf of that principal as required by paragraph (a). Specific requirements for filing the consolidated expenditure report are as follows:

1. A list of all lobbyists representing the principal shall be included with the report. An expenditure report for each lobbyist on the list must be made pursuant to the reporting requirements of paragraph (a). The report for each lobbyist on the list must contain a cumulative total for the reporting period for all reportable categories. The consolidated report filed on January 15 shall contain a cumulative total for the calendar year for all reportable

categories for each lobbyist and shall contain a cumulative total for the calendar year of all lobbying expenditures of all lobbyists represented on the consolidated report.

2. The report of lobbying expenditures by the principal shall be made pursuant to the requirements of paragraph (a). The report shall contain a cumulative total of expenditures made by the principal for the reporting period. The report filed on January 15 shall contain a cumulative total of all expenditures of the principal for the calendar year.

3. The principal is responsible for the accuracy of figures reported as lobbying expenditures made by the principal. Each lobbyist whose expenditures are included in the report is responsible for the accuracy of the lobbying expenditure figures submitted to the principal by that lobbyist for inclusion in the consolidated report filed by the designated lobbyist.

(c) The reporting statements shall be filed by April 15, July 15, October 15, and January 15 of each year and shall include the expenditures for the period from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, respectively. The report due January 15 shall include a cumulative total for the calendar year for all reportable categories. The statements shall be rendered in the identical form provided by the respective houses and shall be open to public inspection. A reporting statement need not be filed if there have been no expenditures during a reporting period. However, the registrant shall certify on the report due January 15 that there were no expenditures

during any reporting period for which a report was not filed. Reporting statements may be filed by electronic means, when feasible.

(4) Each house of the Legislature shall provide by rule a procedure by which a person, when in doubt about the applicability and interpretation of this section in a particular context, may submit in writing the facts for an advisory opinion to the committee of the respective house and may appear in person before the committee. The rule shall provide a procedure by which:

(a) The committee shall render advisory opinions to any person who seeks advice as to whether the facts in a particular case would constitute a violation of this section.

(b) The committee shall make sufficient deletions to prevent disclosing the identity of persons in the decisions or opinions.

(c) All advisory opinions of the committee shall be numbered, dated, and open to public inspection.

(5) Each house of the Legislature shall keep all advisory opinions of the committees relating to lobbyists and lobbying activities, as well as a current list of registered lobbyists and their respective reports required under this section, all of which shall be open for public inspection.

(6) The committee of the respective house shall investigate any person engaged in legislative lobbying upon receipt of a sworn complaint alleging a violation of this section, s. 112.3148, or s. 112.3149 by such person. Such proceedings shall be conducted pursuant to the rules of the respective houses. If the committee finds that

there has been a violation of this section, s. 112.3148, or s. 112.3149, it shall report its findings to the President of the Senate or the Speaker of the House of Representatives, as appropriate, together with a recommended penalty, to include a fine of not more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months. Upon the receipt of such report, the President of the Senate or the Speaker of the House of Representatives shall cause the committee report and recommendations to be brought before the respective house and a final determination shall be made by a majority of said house.

(7) Any person required to be registered or to provide information pursuant to this section or pursuant to rules established in conformity with this section who knowingly fails to disclose any material fact required by this section or by rules established in conformity with this section, or who knowingly provides false information on any report required by this section or by rules established in conformity with this section, commits a noncriminal infraction, punishable by a fine not to exceed $5,000. Such penalty shall be in addition to any other penalty assessed by a house of the Legislature pursuant to subsection (6).

(8) There is hereby created the Legislative Lobbyist Registration Trust Fund, to be used for the purpose of funding any office established for the purpose of funding the administration of the registration of lobbyist lobbying the Legislature, including the payment of salaries and other expenses. The trust fund is not subject to the service charge to general revenue provisions of chapter 215. Fees collected pursuant to rules established in accordance with

subsection (2) shall be deposited into the Legislative Lobbyist Registration Trust Fund.

11.047 Contingency fees; prohibitions; penalties. –

(1) "Contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent or in any way contingent on the enactment, defeat, modification, or other outcome of any specific legislative action.

(2) No person may, in whole or in part, pay, give, or receive, or agree to pay, give, or receive, a contingency fee. However, this subsection does not apply to claims bills.

(3) Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If such person is a lobbyist, the lobbyist shall forfeit any fee, bonus, commission, or profit received in violation of this section and is subject to the penalties set forth in s. 11.045. When the fee, bonus, commission, or profit is nonmonetary, the fair market value of the benefit shall be used in determining the amount to be forfeited. All forfeited benefits collected shall be deposited into the Legislative Lobbyist Registration Trust Fund.

(4) This section does not apply to any contract providing for compensation by contingency fee which is in existence on the date this act becomes a law and which does not provide for compensation by contingency fee for lobbying after December 31, 1993.

(5) Nothing in this section may be construed to prohibit any salesperson engaging in legitimate state business on behalf of a company from receiving compensation or commission as part of a bona fide contractual arrangement with that company.

112.3215 Executive branch lobbyists; registration and reporting; investigation by commission. –

(1) For the purposes of this section:

(a) "Agency" means the Governor, Governor and Cabinet, or any department, division, bureau, board, commission, or authority of the executive branch.

(b) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying.

(c) "Fund" means the Executive Branch Lobby Registration Trust Fund.

(d) "Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee.

(e) "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity. "Lobbyist" does not include a person who is:

1. An attorney, or any person, who represents a client in a judicial proceeding or in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before an agency, board, commission, or authority of this state.

2. An employee of an agency acting in the normal course of his or her duties.

3. A confidential informant who is providing, or wishes to provide, confidential information to be used for law enforcement purposes.

4. A person who lobbies to procure a contract pursuant to chapter 287 which contract is less than the threshold for CATEGORY ONE as provided in s. 287.017(1)(a).

(f) "Principal" means the person, firm, corporation, or other entity which has employed or retained a lobbyist.

(2) The Executive Branch Lobby Registration Trust Fund is hereby created within the commission to be used for the purpose of funding any office established to administer the registration of lobbyists lobbying an agency of the executive branch, including the payment of salaries and other expenses. The trust fund is not subject to the service charge to General Revenue provisions of chapter 215. All annual registration fees collected pursuant to this section shall be deposited into such fund.

(3) A person may not lobby an agency until such person has registered as a lobbyist with the commission. Such registration shall be due upon initially being retained to lobby and is renewable on a calendar year

basis thereafter. The registration shall require the lobbyist to disclose, under oath, the following information:

(a) Name and business address;

(b) The name and business address of each principal represented;

(c) His or her area of interest;

(d) The agencies before which he or she will appear; and

(e) The existence of any direct or indirect business association, partnership, or financial relationship with any employee of an agency with which he or she lobbies, or intends to lobby, as disclosed in the registration.

(4) The annual lobbyist registration fee shall be $20 for each principal represented.

(5)

(a) A lobbyist must also submit to the commission, quarterly, a signed expenditure report summarizing all lobbying expenditures by the lobbyist and the principal. All expenditures made by the lobbyist and the principal for the purpose of lobbying must be reported. The report of such expenditures must identify whether the expenditure was made directly by the lobbyist, directly by the principal, initiated or expended by the lobbyist and paid for by the principal, or initiated or expended by the principal and paid for by the lobbyist. Expenditures made must be reported by the category of the expenditure, including, but not limited to, the categories of food and beverages, entertainment, research, communication, media advertising, publications, travel, and lodging.

Lobby expenditures do not include a lobbyist's or principal's salary, office expenses, and personal expenses for lodging, meals, and travel.

(b) A principal who is represented by two or more lobbyists shall designate one lobbyist whose expenditure report shall include all lobbying expenditures of the principal and of all of the lobbyists on behalf of that principal as required by paragraph (a). Specific requirements for filing the consolidated expenditure report are as follows:

1. A list of all lobbyists representing the principal shall be included with the report. An expenditure report for each lobbyist on the list must be made pursuant to the reporting requirements of paragraph (a). The report for each lobbyist on the list must contain a cumulative total for the reporting period for all reportable categories. The consolidated report filed on January 15 shall contain a cumulative total for the calendar year for all reportable categories for each lobbyist and shall contain a cumulative total for the calendar year of all lobbying expenditures of all lobbyists represented on the consolidated report.

2. The report of lobbying expenditures by the principal shall be made pursuant to the requirements of paragraph (a). The report shall contain a cumulative total of expenditures made by the principal for the reporting period. The report filed on January 15 shall contain a cumulative total of all expenditures of the principal for the calendar year.

3. The principal is responsible for the accuracy of figures reported as lobbying expenditures made by the principal. Each lobbyist whose expenditures are included

in the report is responsible for the accuracy of the lobbying expenditure figures submitted to the principal by that lobbyist for inclusion in the consolidated report filed by the designated lobbyist.

(c) The reporting statements shall be due on April 15, July 15, October 15, and January 15 of each year and shall include the expenditures for the period from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, respectively. The report due January 15 shall include a cumulative total for the calendar year for all reported categories. A statement need not be filed if there have been no expenditures during a reporting period. However, the registrant shall certify on the report due January 15 that there were no expenditures during any reporting period for which a reporting statement was not filed.

(d) The commission shall adopt a rule which allows reporting statements to be filed by electronic means, when feasible.

(e) Each lobbyist and each principal shall preserve for a period of 4 years all accounts, bills, receipts, computer records, books, papers, and other documents and records necessary to substantiate lobbying expenditures. Any documents and records retained pursuant to this section may be inspected under reasonable circumstances by any authorized representative of the commission. The right of inspection may be enforced by appropriate writ issued by any court of competent jurisdiction.

(6) A lobbyist may cancel his or her registration with the commission upon termination of the contract or

other such employment relationship with his or her principal. Such cancellation must be by written notice to the commission.

(7) The commission shall investigate every sworn complaint that is filed with it alleging that a person covered by this section has failed to register, has failed to submit an expenditure report, or has knowingly submitted false information in any report or registration required in this section. All proceedings, the complaint, and other records relating to the investigation are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and any meetings held pursuant to an investigation are exempt from the provisions of s. 286.011(1) and s. 24(b), Art. I of the State Constitution either until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the commission determines, based on the investigation, whether probable cause exists to believe that a violation has occurred. These exemptions are subject to the Open Government Sunset Review Act in accordance with 1 s. 119.14.

(8) If the commission finds no probable cause to believe that a violation of this section occurred, it shall dismiss the complaint, whereupon the complaint, together with a written statement of the findings of the investigation and a summary of the facts, shall become a matter of public record, and the commission shall send a copy of the complaint, findings, and summary to the complainant and the alleged violator. If the commission finds probable cause to believe that a violation occurred,

it shall report the results of its investigation to the Governor and Cabinet and send a copy of the report to the alleged violator by certified mail. Such notification and all documents made or received in the disposition of the complaint shall then become public records. Upon request submitted to the Governor and Cabinet in writing, any person whom the commission finds probable cause to believe has violated any provision of this section shall be entitled to a public hearing. Such person shall be deemed to have waived the right to a public hearing if the request is not received within 14 days following the mailing of the probable cause notification. However, the Governor and Cabinet may on its own motion require a public hearing and may conduct such further investigation as it deems necessary.

(9) If the Governor and Cabinet find that a violation occurred, 2 it may reprimand the violator, censure the violator, or prohibit the violator from lobbying all agencies for a period not to exceed 2 years.

(10) Any person, when in doubt about the applicability and interpretation of this section to himself or herself in a particular context, may submit in writing the facts of the situation to the commission with a request for an advisory opinion to establish the standard of duty. An advisory opinion shall be rendered by the commission and, until amended or revoked, shall be binding on the conduct of the person who sought the opinion, unless material facts were omitted or misstated in the request.

(11) Agencies shall be diligent to ascertain whether persons required to register pursuant to this section have complied. An agency may not knowingly permit a person

who is not registered pursuant to this section to lobby the agency.

(12) Upon discovery of violations of this section an agency or any person may file a sworn complaint with the commission.

(13) The commission shall adopt rules to administer this section, which shall prescribe forms for registration and expenditure reports, procedures for registration, and procedures that will prevent disclosure of information that is confidential as provided in this section.

112.3217 Contingency fees; prohibitions; penalties. –

(1) "Contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent or in any way contingent on the enactment, defeat, modification, or other outcome of any specific executive branch action.

(2) No person may, in whole or in part, pay, give, or receive, or agree to pay, give, or receive, a contingency fee. However, this subsection does not apply to claims bills.

(3) Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If such person is a lobbyist, the lobbyist shall forfeit any fee, bonus, commission, or profit received in violation of this section and is subject to the penalties set forth in s. 112.3215. When the fee, bonus, commission, or profit is nonmonetary, the fair market value of the benefit shall be used in determining the amount to be forfeited. All forfeited benefits shall be

deposited into the Executive Branch Lobby Registration Trust Fund.

(4) This section does not apply to any contract providing for compensation by contingency fee which is in existence on the date this act becomes a law and which does not provide for compensation by contingency fee for lobbying after December 31, 1993.

(5) Nothing in this section may be construed to prohibit any salesperson engaging in legitimate state business on behalf of a company from receiving compensation or commission as part of a bona fide contractual arrangement with that company.

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

(2)

No. 96-573

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

FLORIDA LEAGUE OF
PROFESSIONAL LOBBYISTS, INC.,
Petitioner,

vs.

WILLIAM N. MEGGS, as State Attorney for the
Second Judicial Circuit of Florida,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.
(Restated)

Whether Chapter 93-121, Laws of Florida, requiring the reporting of expenditures made for the purpose of lobbying by lobbyists or their principles and the sources of funds for such expenditures, violates the First Amendment, United States Constitution.

II.
(Restated)

Whether Chapter 93-121, Laws of Florida, violates the First Amendment, United States Constitution, by prohibiting a person from paying a fee to a lobbyist that is contingent on any specific legislative or executive branch action.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. CHAPTER 93-121, LAWS OF FLORIDA, DOES NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING A LOBBYIST OR HIS PRINCIPAL TO REPORT ALL EXPENDITURES MADE FOR THE PURPOSE OF LOBBYING AND THE SOURCE OF FUNDS FOR SUCH EXPENDITURES. 4

II. CHAPTER 93-121 DOES NOT VIOLATE THE FIRST AMENDMENT BY PROHIBITING A PERSON FROM PAYING A FEE TO A LOBBYIST CONTINGENT ON SPECIFIC LEGISLATIVE OR EXECUTIVE BRANCH ACTION. 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	PAGE(S)
Buckley v. Valeo, 424 U.S. 1 (1976)	passim
City of Hialeah Gardens v. John L. Adams & Co. 599 So.2d 1322 (Fla. App.), *rev. denied*, 613 So.2d 5 (Fla. 1992	11
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	5,7,9
Hazelton v. Sheckels, 202 U.S. 71 (1906)	11
McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995)	passim
Meyer v. Grant, 486 U.S. 414 (1988)	12,13
NAACP v. Alabama, 357 U.S. 449 (1958)	5,10
Providence Tool Co. v. Norris, 69 U.S. 45, 17 L.Ed. 868 (1864)	11
Riley v. National Federation of the Blind, 487 U.S. 781 (1988)	12,13
United States v. Harriss, 347 U.S. 612 (1954)	passim
United States v. National Treasury Employees Union, 115 S.Ct. 1003 (1995)	12
Wechsler v. Novak, 26 So.2d 884 (Fla. 1946)	11

STATUTES

28 U.S.C. §1254 1

Section 11.045, Fla. Stat. (1995) 4

Section 112.3215, Fla. Stat. 4

IN THE SUPREME COURT OF THE UNITED STATES
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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 87 F.3d 457. The opinion of the district court (Pet. App. 14-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1996. The petition for a writ of certiorari was filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, the Florida League of Lobbyists, Inc. (the "League"), seeks review of a decision of the court of appeals affirming the district court's entry of summary judgment in favor of the respondent, William N. Meggs, State Attorney. Respondent Meggs, a prosecuting attorney, was sued as a nominal representative of the state. This case did not arise in the context of any attempt at prosecution, either by the Florida Legislature or respondent Meggs.

The League's complaint in this action challenged the constitutionality of Chapter 93-121, Laws of Florida, and sought declaratory and injunctive relief. Count I asserted the recordkeeping requirements for reporting of lobbying expenditures were costly and burdensome and were not supported by a compelling governmental interest. Count II alleged that the requirement that a lobbyist disclose his principal's identity was likewise not supported by a compelling governmental interest. Count III raised essentially the same claim with respect to the prohibition on contingency fees.

The district court, based upon the representations of the League's counsel, ruled that the League had presented a facial challenge *only* to the constitutionality of Chapter 93-121 and determined that the issues were ripe for summary judgment. On cross-motions for summary judgment the district court upheld the facial validity of Chapter 93-121 and granted summary judgment in favor of respondent. The court of appeals also perceived the challenge as one to facial validity, noting that the League had "failed to allege a specific unconstitutional application" of the reporting requirement. (Pet. App. 4)

The parties did submit affidavits to the district court with respect to the burdensome nature of the reporting requirements. The district court's ruling pointed out that the League's evidence contained only estimates of what it would cost to comply with the

reporting requirements and that it completely failed to show that the burden of compliance would deter individuals from exercising their First Amendment rights. (Pet. App. 24) The district court also found a similar defect with respect to the League's assertion that some persons would be discouraged from exercising their right to lobby if they could not do so through a contingency fee arrangement, noting a complete lack of evidence to support the argument. (Pet. App. 27)

The respondent provided to the district court affidavits describing how lobbyists seek to "indirectly" influence the legislative process by orchestrated letter writing and media campaigns, the provision of reports and studies researched and prepared by lobbyists or their principals, and the pervasive efforts to garner goodwill with free entertainment, food, beverages and other tangible items. The League made no effort to prove that the state's interests in evaluating the scope of such indirect pressures are any less compelling than its interests in the financing of more direct and personal communications.

ARGUMENT

The reporting requirements of the law at issue apply only to professional lobbyists, that is, those who are paid by a principal to influence or attempt to influence legislative or executive branch lobbying. *See* section 11.045(1)(e), (f) and (g), Fla. Stat. (1995) (Pet. App. 28) (provisions applicable to the legislative branch).[1] The League, as the district court found, completely failed to show that the reporting requirements were unduly burdensome or onerous. Thus, the League argued below, and now argues in this Court, that a hired lobbyist cannot constitutionally be required to disclose any expenditure intended to influence legislation unless that expenditure was made in support of a direct oral or written communication between a lobbyist and a legislator. According to the League, neither the legislature itself nor the citizens of the state can have a compelling interest in identifying the amounts and sources of the vast sums lobbyists or their principals expend to influence government action in the absence of direct conversation between a lobbyist and a legislator (or executive branch official).

The court of appeals properly rejected the League's facial challenge to Chapter 93-121. The decision of the court of appeals is correct and does not conflict with any decision of this Court. Nor does the League's petition argue conflict with any decision of a federal court of appeals or the supreme court of any state. Further review is not warranted. *See* Rule 10, Rules of the Supreme Court.

I. CHAPTER 93-121, LAWS OF FLORIDA, DOES NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING A LOBBYIST OR HIS PRINCIPAL TO REPORT ALL EXPENDITURES MADE FOR THE PURPOSE OF LOBBYING AND THE SOURCE OF FUNDS FOR SUCH EXPENDITURES.

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[1]Section 112.3215(1), Fla. Stat, contains corresponding provisions applicable to the executive branch. (Pet. App. 35 et. seq.)

In recent years this Court has repeatedly recognized the deterrent effect of disclosure laws on corrupt political practices and the interest of the public in knowing the identity of those who expend money to support candidates and the amounts spent. *See Buckley v. Valeo*, 424 U.S. 1, 64-72 (1976); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1522-1523 (1995). The Court has described the government's interests in disclosure as "substantial" and found them weighty enough to survive strict scrutiny, at least in the context of a facial challenge that fails "to demonstrate injury of the sort at stake in *NAACP v. Alabama*, [357 U.S. 449 (1958)]." *Buckley, supra*, at 68, 70. *Buckley* plainly stated that disclosure requirements were "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

The interests identified in these cases differ not at all from the interests of legislators and members of the public in being informed about the source and flow of lobbyists' money, money that is by definition intended to influence legislative or executive action. *See United States v. Harriss*, 347 U.S. 612, 625 (1954). Whether or not the *Harriss* decision used precisely the same terminology forty years ago, the interests at issue here are clearly compelling.

Indeed, both courts below found that the interests of the State of Florida were compelling and that the League did not dispute this point. (Pet. App. 8,9,19) The district court expressly found that the League had adduced *no* evidence comparable to that which rightly troubled this Court in *NAACP v. Alabama*. (Pet. App. 23-24) The League's argument is therefore plainly inadequate. In sum and substance it asserts that if only the court of appeals had applied strict scrutiny to Chapter 93-121 it would necessarily have found the reporting requirements unconstitutional. In fact, both lower courts did consider that standard and found a complete lack of evidence--such as was adduced in *NAACP v. Alabama*--that would suffice to override the state's compelling interests in

disclosure.

Thus, having failed to show that the disclosure requirements seriously infringed the First Amendment rights of lobbyists or principals, the League has broadly asserted that there is no compelling state interest in what it terms "indirect" lobbying. By this it means activities *intended* to influence legislative or executive action that do not involve a "direct" communication between a lobbyist and a legislator or executive official. (Pet. p.11) The court of appeals quickly dispensed with this illogic:

> [T]he government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements. *Harriss* appears to have acknowledged as much when, even reading the statute narrowly to apply only to "direct communication," it nonetheless defined direct communication to include "artificially stimulated letter campaign[s]." *Harriss*, 347 U.S. at 620, 74 S.Ct. at 813.

(Pet. App. 9)

In addressing the League's facial challenge, the court of appeals did not, as the petition suggests, impose some inappropriately high burden of persuasion. It was not necessary in this case for the court to even decide whether the League's burden was to show the law unconstitutional in *all* applications, *most* applications, or some *"large fraction."* (Pet. App. 5) As the court of appeals correctly concluded, the League failed to meet any of these standards. In fact, at no time has the League identified even one instance in which the reporting requirements of Chapter 93-121 would likely be held unconstitutional.

This failure is illustrated by the League's near total reliance on

McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995), in support of its facial challenge. For the League to contend that *McIntyre* "applies verbatim" to the statute at issue here (Pet. pp.7-8) only underscores the weakness of its case. In *McIntyre* this Court struck down an Ohio law that prohibited the distribution of anonymous campaign literature, which the decision characterized as "core political speech." The Court was careful to distinguish its earlier disclosure rulings in *United States v. Harriss* and *First Nat. Bank of Boston v. Bellotti*, *see* 115 S.Ct. 1522, n.18, and, with particular relevance to this case, stated:

> Our reference in the *Bellotti* footnote to the prophylactic effect" of disclosure requirements cited a portion of our earlier opinion in *Buckley*, in which we stressed the importance of providing the "electorate with information 'as to where political campaign money comes from and how it is spent by the candidate.'" 424 U.S. at 66. We observed that the "sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 67. Those comments concerned contributions to the candidate or expenditures authorized by the candidate or his responsible agent. *They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.*

115 S.Ct. at 1522-23 (emphasis added)

Nevertheless, relying on *McIntyre*, the League asserts the Florida law is flawed because lobbyists would have to report

expenditures on media advertising and publications. (Pet. at 9) Such expenditures are reportable if the intended purpose of the advertising or publication is to influence legislation, but this requirement in no way offends the rationale of *McIntyre*. The League ignores *McIntyre's* careful distinction between a handbill's "personally crafted statement of a political viewpoint" and the "disclosure of an expenditure and its use." *Id.* at 1523.

The League also complains of other imagined applications of the disclosure requirement:

> An organization which employs a lobbyist cannot research, print or distribute a flyer or newspaper advertisement, or send letters to its membership discussing legislative action on a matter without reporting all covered expenses.
>
> If an organization which has hired a lobbyist has a meeting of its officers or membership at which efforts to influence legislation are discussed, all organizational expenses relating to the meeting must be recorded and reported.

(Pet. at 11)

Again, expenditures for research, flyers, advertisements or letters are reportable only if these items are intended to influence legislative action. Moreover, the term "organizational expenses" is one of the League's invention. A joint rule adopted by the Florida Legislature would exempt most such expenses. Both of these examples were argued to the lower courts and neither was found to merit discussion.

The court of appeals and the district court understood that *Harriss*, despite its language about "direct" communications, did not support the extremely restrictive application the League demands for the Florida law. (Pet. App. 9,21) *Harriss* expressly

acknowledged that direct communication would include "artificially stimulated letter campaigns" or pressures exerted by a lobbyist's "hirelings." 347 U.S. at 620. The League's retrograde interpretation of *Harris* is not only plainly inconsistent with this language but is wholly at odds with the Court's more recent pronouncements in *Buckley, Bellotti* and *McIntyre*.

Furthermore, *Harris* involved a criminal prosecution and the real issue was whether the federal lobbying act could withstand a vagueness challenge. The question this Court addressed was *who* were the persons to whom the act could constitutionally apply, not the lobbying expenditures required to be reported. Unlike the Florida law, §307 of the federal act was not by its terms limited to professional lobbyists--that is, only those persons hired and paid to influence legislation. Section 307 and the reporting requirements of §305 applied to "any person" who might collect or receive money that would even "indirectly" aid in or influence the passage of legislation. As written, the criminal sanctions of the federal act applied equally to those who were not hired lobbyists but who merely sought to exercise their First Amendment rights to engage in or stimulate public debate. Hence, the *Harriss* decision limited the application of the federal act to persons engaged in

> "'lobbying in its commonly accepted sense'"--to direct communication with members of Congress on pending or proposed federal legislation. *The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.*

347 U.S. at 620-621 (emphasis added) (footnotes omitted). It is obvious that *Harriss* intended only to foreclose application of the federal act to individuals or organizations who sought to influence public opinion, not to restrict the power of Congress to inform itself about the calculated activities of hired, professional lobbyists.

In view of the record of this case, the League's assertion that the court of appeals "fashioned a new, far more forgiving test for First Amendment analysis of content based laws" states no issue at all. The Florida law is neutral as to viewpoint. To the extent it is "content based" it is like numerous other disclosure laws this Court has approved that work to shed some light on money in the political process. Under *Buckley* and other cases the government's interest in such laws is compelling and will yield, if at all, only in the face of evidence of the sort proffered in *NAACP v. Alabama*. *Buckley*, 424 U.S. 68-72. There is no such evidence in this case and therefore no reason to grant the writ. There is nothing to review.

II. CHAPTER 93-121 DOES NOT VIOLATE THE FIRST AMENDMENT BY PROHIBITING A PERSON FROM PAYING A FEE TO A LOBBYIST CONTINGENT ON SPECIFIC LEGISLATIVE OR EXECUTIVE BRANCH ACTION.

This Court and many others have long treated fee agreements that are contingent on procurement of government favors as contrary to public policy and unenforceable. As this Court said almost a century and a half ago:

> [T]he decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. . . . Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the

> end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.
>
> There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of elements to control the action of both, is the direct and inevitable result of all such arrangements.

Providence Tool Co. v. Norris, 69 U.S. 45, 17 L.Ed. 868, 870-871 (1864). Over forty years later, Justice Holmes, in a similar decision, reiterated that "the objection to [such agreements] rests in their tendency, not in what was done in the particular case." *Hazelton v. Sheckels*, 202 U.S. 71, 79 (1906).[2]

This Court has rendered no decision in the intervening years that would cast doubt on *Providence Tool Co.* or *Hazelton*, nor has it suggested that any legislative effort to prohibit such agreements should be subject to an evidentiary trial. The latter point is one of common sense:

> The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear.

Hazelton, 202 U.S. at 79. Nothing has happened since 1864 to change the "tendency" of contingency fee agreements, and the respondent should not be held to offering evidence of what is generally hidden.

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[2]Florida's case law follows the *Providence Tool Co.* decision. *See Wechsler v. Novak*, 26 So.2d 884 (Fla. 1946); *City of Hialeah Gardens v. John L. Adams & Co.*, 599 So.2d 1322 (Fla. App.), *rev. denied*, 613 So.2d 5 (Fla. 1992). Research the respondent presented to the district court indicated that at least 34 states in addition to Florida ban contingency fee lobbying.

Ignoring this historic and pervasive policy, the League contends that "the expenditure of money is a form of expression," and, this being so, the ban on contingency fees for lobbyists cannot survive strict scrutiny. The few cases cited lend no support to this argument.

United States v. National Treasury Employees Union, 115 S.Ct. 1003 (1995), actually supports Florida's restriction. The federal law at issue in that case banned speaking and writing honoraria not only for members of Congress and high officials, but also for rank and file government employees. The government had no evidence of misconduct as to this latter group.[3] In the absence of such evidence, the Court held that Congress could not restrict the speech of lower level government employees "with negligible power to confer favors on those who might pay to hear them speak or to read their articles." *Id.* at 1016. On the other hand, the Court stated that Congress could reasonably assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [the] appearance of improper influence." *Id.* The Florida legislature was at least as justified in acting as it did not only because of the appearance of improper influence that contingency fee agreements present but also because of their long-recognized corrupting tendencies.

The League's reliance on *Meyer v. Grant*, 486 U.S. 414 (1988), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), is similarly misplaced. Neither case dealt with a prohibition on contingency fee lobbying, much less the

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[3]This Court described the activities of the rank and file employees in these words:

> The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.

115 S.Ct. at 1013.

considerations that bear on potential corruption of the lawmaking process. *Meyer v. Grant* concerned a complete prohibition on paying anyone to circulate petitions proposing state constitutional amendments. Chapter 93-121, however, does not prohibit compensating lobbyists; it prohibits only one narrow form of compensation, contingency fee arrangements. The League has not adduced the first bit of evidence to establish that contingency fee payments are necessary for anyone.

The *Riley* case reflects this Court's concern with a state's attempt to impose unwanted speech upon professional fund raisers engaged in charitable solicitations, *i.e.*, to require such persons to disclose to potential donors the average percentage of gross receipts actually turned over to charities. The law in question also imposed presumptive limitations on the percentage of receipts deemed reasonable for fund raisers to retain. The Supreme Court found, *inter alia*, that the statute was not narrowly drawn to achieve its goal of setting reasonable fees. Chapter 93-121 does not attempt to regulate the amount a lobbyist may charge a principal or set presumptively reasonable fees. The law is narrowly drawn in that it regulates only that fee arrangement that is most likely to have a corrupting tendency and to impair the integrity of the lawmaking body or executive officials.

The League has failed to show that contingency fee agreements are essential to anyone's right to present his views to the legislature or that the law precludes reasonable payment for a lobbyist's services when rendered. Given the historically recognized effects of such agreements, it can hardly be said that the prohibition is so problematic that it must be held facially unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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